82-1276

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

DIAMOND M DRILLING CORPORATION
Petitioner

VERSUS

DAVID R. TARLTON AND
EXXON CORPORATION
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the trial court enters an original judgment and then a superceding judgment—whether, as held by the court below, the ten day time limitation for post-judgment relief at the trial court level must run from the original judgment rather than the superceding judgment despite the fact that the superceding judgment makes a change of substance which revised legal obligations of the litigants?

2. Whether it is proper for an appellate court to take judicial notice of the appropriateness or inappropriateness of a safety practice in a similar but factually distinguishable circumstance and apply that "fact" (the appropriateness vel non of the safety practice) to adjudicate the liabilities in the case before it where counsel are not given the opportunity to cross examine or present contrary evidence relative to the appropriateness of the safety practice in the fact situation borrowed from by the appellate court?

3. Whether a jury charge with respect to the issue of damages is proper where the sole reference to inflation was "you may also take into consideration the decreased buying power of the dollar or what is commonly called inflation", no guidelines etc. relative to the consideration of inflation being given?

LIST OF PARTIES

Pursuant to the Supreme Court rule 21(b) and 28.1, the counsel for petitioner certifies that all parties to this proceeding are:

Diamond M Drilling Corporation

Exxon Corporation

David R. Tarlton

Goldean Meadow Enterprises, Inc.

Eserman Offshore Services

Coastal Boat Operators, Inc.

Diamond M Drilling Corporation is a wholly owned subsidiary of Kaneb Services, Inc. Corporations related to Kaneb Services, Inc. and/or Diamond M Drilling Corporation in a subsidiary, affiliate or parent relationship are:

PLT Engineering, Inc.

Kaneb Pipe Line Company

Interstate Coal—Executive

Stansbury & Company, Inc.

The Rein Company

PLT (BV)

PLT (PTY, LTD.)

Texas Energy Services, Inc.

Mustang Coal, Inc.

Phillips & Jordan, Inc.

Four G Investment Corporation

Interstate Coal Company, Inc.

Mountain Clay, INc.

Leeco, Inc.

Kaneb Coal Division

Eagle Creek Resources, Inc.
Ikerd-Bandy Company, Inc.
PLT (NZ)
Randall Fuel Company, Inc.
Weaver Oil and Gas, Australia
Perthshire Petroleum, Ltd.
Weaver Oil and Gas Corporation
Mesozoic Resources, Ltd.
Alpine Coal, Inc.
Ken-Coal, Inc.
United States Coal Company
Intercomp Resource Development and Engineering, Inc.
DFW Business Forms & Computer Supplies
American Oilfield Products, Inc.
Highland Coal, Inc.
Diamond M Company
Mechlenburg Coal & Mining, Inc.
Grove Coal Company
Welsh Drilling & Service, Inc.
Houston Rental Equipment, Inc.
Farmer Coal Company
Diamex Company
Consolidation (PLT & Subsidiaries)
PLT (Offshore Ltd.)
Gillette Minerals
Enhanced Energy Resources, Inc.
OTEK Equipment Manufacturing, Inc.
Kem Coal Company
Typo Mining

Aceco, Inc.

EER—Brookwood Project

Kaneb Investment Corporation

Kaon Surety and Indemnity Company

Security, Incorporated

Polls Creek

Bituminous-Laurel Mining, Inc.

Energy Storage Terminals, Inc.

Vermont Wood Products, Inc.

Petroleum Operating and Support Services, Inc. (Houston)

Petroleum Operating and Support Services, Inc. (New Orleans Operations)

Integrated Graphic Services

Coal Consolidated

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at __ F.2d __ (5th Cir. 1982) and is reproduced as Appendix A and the order of the Fifth Circuit denying the petition for rehearing is reproduced as Appendix B.

STATEMENT OF JURISDICTIONAL GROUNDS

Judgment was rendered on September 27, 1982 by the United States Court of Appeals for the Fifth Circuit. Petition for rehearing was timely filed and the order denying Diamond M Drilling Company's request for rehearing

was entered on November 12, 1982. This petition for writ of certiorari was filed within 90 days of the date of the denial of Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

In pertinent part rule 59 of the Federal Rule of Civil Procedure provides:

> (a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;....
>
> (b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment....
>
> (d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor...

STATEMENT OF THE CASE

David Tarlton was injured while serving as captain of the M/V BECT I, a vessel under charter to Exxon which was used to service certain Exxon fixed platforms which were located in the outer continental shelf off of the coast of Louisiana. At the time, the seas were running six to eight feet. Notwithstanding the substantial seas the platform crane operator, an employee of Diamond M Drilling Company, loaded drill collars (heavy pipe approximately thirty feet in length by six inches in diameter) onto the deck of the BECT I. Tarlton was not aware that the drill collars were being loaded onto his boat until after they were aboard. While attempting to assist the deck personnel in securing the drill collars, which were rolling about the deck, Tarlton was injured by the rolling drill collars.

The claim asserted against Diamond M was that its employee crane operator should not have lowered the tubular material (the drill collars) onto the boat, considering the height of the seas. The claims against Exxon were that it on prior occasions dispatched supply boats of the size of the BECT I to receive drill collars in seas of the same height and that the Exxon representatives on the platform on prior occasions had always condoned the loading, and these prior[1] practices were factors influencing

[1] The prior practcies were what was at issue; on the night of the accident the Exxon representative on the platform was asleep and had no knowledge of the then occurring activities. The prior practices were admitted by the Exxon marine transportation superintendent (tr.965,966) and by the Exxon representative on the platform (tr.1020). The Diamond M crane operator, the Exxon marine transportation superintendent

the crane operator to lower the drill collars on the occasion of the accident. Exxon was the ultimate authority on the job; all companies involved were working under contract to Exxon.

The case was tried to a jury, which returned a special verdict finding Diamond M and Exxon liable to Tarlton, with fault percentages of 95% and 5%, respectively. The jury awarded Tarlton $450,000.00 in damages. The jury had been charged that in assessing damages it may take inflation into consideration.

The plaintiff's employer and the boat operator were additional defendants and were cross defendants. The jury exonerated them from negligence; the trial judge, rather than the jury, was to rule upon the contractual matters which were the bases of the cross claims relative to them.

Exxon and Diamond M had entered a stipulation on the record, based upon the contractual arrangement[2] between them that if Diamond M and Exxon were each found at fault Exxon would pay the entirety of any portion of the award against Diamond M.

(Footnote 1 continued)
and the Exxon representative on the platform admitted that the practice was unsafe. (tr. 64-65, 965-966, 1004-1005).

[2] The contract provided that Exxon would indemnify Diamond M for all claims by employees of Exxon or its subcontractors unless Diamond M was solely at fault; a similar indemnity ran in favor of Exxon for claims by Diamond M employees or employees of Diamond M subcontractors. Exxon had the responsibility of providing marine transportation to the platform, and thus the employees on the BECT I were employees of Exxon subcontractors.

The trial judge first entered judgment relative to the main demand only; this judgment was in accordance with the verdict.

Within 10 days of entry of this judgment Exxon moved for judgment notwithstanding the verdict and sought a remittitur. Under the stipulation between it and Diamond M, Exxon was liable for the entire verdict.

The hearing on the motion for judgment n.o.v. and remittitur was held more than ten days after the entry of the judgment relative to the issues on the main demand. Following the hearing on the motions the trial judge granted Exxon's motion for judgment n.o.v., totally exonerating Exxon, and simultaneously, sua sponte, granted a new trial unless the plaintiff remits $75,000.00 of the award, and entered a judgment[3] in which the cross claims as well as the main demand were treated.

Diamond M appealed. The plaintiff also appealed contending that the trial judge erred in granting the remittitur.[4]

---

[3] Clearly this judgment rather than the earlier judgment entered on the main demand only is the "final judgment" for appeal purposes, but as the Court of Appeals pointed out in its opinion (see appendix A,) a judgment which will start the 10 day post trial relief time limit running does not, under existing jurisprudence, have to be a "final judgment." However, as argued in this petition, the time limit should run anew if there is a superceding judgment revising the substance of the first judgment.

[4] There were also appeals relative to the cross claims involving the other defendants; these are not at issue now.

The Court of Appeals affirmed the trial judge's judgment n.o.v. exonerating Exxon. To do so it took judicial notice of a statement of fact embodied in a holding of another case—a case which is critically different than the instant case. In the instant case the Court of Appeals held "a platform owner is not negligent for dispatching a supply vessel in six to eight foot seas, seas admittedly rough but not necessarily dangerous for loading or unloading", citing *Hebron v. Union Oil of Calif.*, 634 F2d 245 (5 Cir. 1981)—but the material loaded in the *Hebron* case was a prefabricated "A-frame", not tubular goods which would likely roll back and forth on the small boats' deck prior to its being secured.

The Court of Appeals approved the jury charge relative to inflation. With no guidelines being given, the jury was simply told that it could take inflation into consideration.

With respect to the remittitur the Court of Appeals held that the granting of the $75,000.00 remittitur was error because it was untimely. The appeal court held that a motion for remittitur by Diamond M or the trial judge's granting of the remittitur sua sponte had to have occurred within ten days of the first judgment in order to have been timely, and accordingly vacated the granting of the remittitur.

A petition for rehearing was timely filed by Diamond M and was denied on November 12, 1982.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ should be granted because the appellate decision (1) abolishes the right of the litigants to post-judgment relief in the trial court in certain situations, a right long recognized by this court to be important to litigants; the rule should be, as held in other decisions, that when there is a superceding judgment the second judgment begins the running of the ten day limitation for seeking post-judgment relief at the trial level if it revised the legal rights and obligations of the litigants (2) misuses judicial notice of facts at the appellate level; this court should not only correct the error but also set out the criteria for judicial notice at the appellate level and (3) pronounced as appropriate the jury instruction with respect to inflation in which the jury was told simply, "You may also take into consideration the decreased purchasing power of the dollar, or what is commonly called inflation."; whether a jury in a maritime case should be told it may consider inflation, and if so, the guidelines for such instructions are in today's state of the jurisprudence issues which should be resolved by this court. The circuits are in conflict on this issue.

The matters above will be treated in this petition in the order set forth above.

POST-JUDGMENT RELIEF AT THE TRIAL LEVEL

If a superceding judgment is entered adverse to the

originally successful litigant that litigant should have an opportunity for relief by the trial judge.

Rule 59 of the Federal Rules of Civil Procedure provides that "not later than ten days after entry of the judgment" a party may move for post-judgment relief or the trial judge may grant it on his own initiative, sua sponte.

In the instant case the appellate court abolished the originally successful litigant's right to relief from the superceding judgment; the court below held that the ten day period for post-judgment relief from the district court begins to run at the entry of the first judgment *regardless* of whether the second judgment, entered more than ten days after the original judgment, reversed the liability. That is precisely what happened in the instant case.

The record stipulation between defendants Diamond M and Exxon is that if Exxon is decreed to be at fault to any degree, Exxon is to pay the entirety of the judgment. The first judgment was entered upon the jury verdict that Exxon was negligent and liable in the amount of 5%; the judgment accordingly was entirely favorable to Diamond M. Under the judgment Diamond M was required to pay nothing and the entire liability was to be borne by Exxon. Exxon within ten days of that original judgment filed motions for post-trial relief including remittitur. More than ten days after the original judgment the judge entered a superceding judgment and concurrently, sua sponte, entered an order granting a new trial unless the plaintiff

remits $75,000.00 of the jury award. In the superceding judgment Exxon's liability was removed and the entirety of the liability placed on Diamond M such that instead of being totally exonerated, Diamond M was, under the terms of the superceding judgment, totally liable. Yet the appellate court held that Diamond M's opportunity for post trial relief (the $75,000.00 remittitur) had expired *before* the judgment adverse to it was rendered! Accordingly the court below held that the sua sponte remittitur which was entered concurrently with the superceding judgment was untimely because it was not within ten days of the original judgment.

Rule 59 of the Federal Rules, the rule setting forth the rights of litigants for post-judgment relief in the trial court, contains important rights, rights which must not be abolished.

The right to post-judgment relief at the trial court level is of importance and concern to every litigant in Federal Court. (See *U.S. v. Indrelunas,* 411 U.S. 216, 217, 93 Ct. 1562, 1563, 36 L.Ed. 2d 202 (1973)).

In a case treating the issues as to whether the ten day period should begin to run at the entry of the superceding judgment the court in *Cornist v. Richland Parish School Board* 479 Fd.2 37 (5 Cir. 1973) ruled:

> "The District Judge on May 1, 1972 signed the new judgment and wrote in "amended" as requested. The new judgment ordered reinstate-

ment of plaintiffs as before, but omitted, among other things, the provision quoted above relating to Sidney Perkins and instead simply provided in place of the above quoted excerpt from the judgment the following:

'[A]ll other issues were taken under advisement.'

Richland filed its Motion for New Trial on May 10, 1972. Whether it was timely and within the ten day time limit specified by Rule 59(b), Federal Rules of Civil Procedure depends upon the question whether the May 1 Amended Judgment was the judgment contemplated by that subsection. On July 20, 1972 the District Judge denied the Motion for New Trial 'having been filed too late' and determined that the April 20 judgment was the final judgment of the Court.

[1] The Supreme Court said in United States v. Indrelunas, 411 U.S. 216, 217, 93 S.Ct. 1562, 1563, 36 L.Ed. 2d 202 (1973), a related case, that a 'conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered'. To decide when judgment was entered in this case insofar as Rule 59(b) purposes are concerned, *we must refer to a general rule enunciated by a long line of judicial authority, that the second judgment prevails and begins the running of the 10-day limitation, if it is a superceding judgment making a change of substance which 'disturbed or revised legal rights and obligations'.* Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211-212, 73 S.Ct. 245, 248-249, 97 L.Ed. 245 (1952). See Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 19-22, 73 S.Ct. 85,86-87,

97 L.Ed. 15 (1952); Zimmern v. United States, 298 U.S. 167, 56 S.Ct. 706, 80 L.Ed. 1118 (1936). However, if the Court does no more in the second judgment than make a clerical change, such as correct the names of parties or dates, the time for filing motions does not start to run from entry of the second judgment, but rather runs from date of the first judgment. See Department of Banking v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942); United States v. 1,431.80 Acres of Land, 8 Cir., 1972, 466 F.2d 820; Albers v. Gant, 5 Cir. 1970, 435 F.2d 146; Lieberman v. Gulf Oil Corp., 2Cir., 1963, 315 F.2d 403.

It is respectfully submitted that this court should overturn the precedent for erosion of litigants' rights to post-judgment relief at the trial court level, and should grant the writ.

JUDICIAL NOTICE AT THE APPELLATE LEVEL

In the instant case there was misuse of judicial notice of facts at the appellate level. The court hinged its decision on its judicial notice of "fact" the contrary of which was established in the trial and admitted by the interested litigants. That the Appellate court was going to judicially notice the "fact" was a surprise to counsel. The Appellate Court's conclusion that the "fact" is indisputable was based on a misapprehension as will be seen below. It is respectfully submitted that this court should reverse the decision and set out the proper criteria for judicial notice of facts at the appellate level.

The court below, with respect to the key issue of whether or not the jury could have found Exxon 5% negligent, stated:

> "Diamond M maintains that Exxon representatives previously had condoned loading vessels in six to eight foot seas, a practice cited as negligent. Although this proposition bears some surface appeal, it fades upon closer examination. As we held in *Hebron v. Union Oil Co. of Calif.*, 634 F.2d 245 (5th Cir. 1981), a platform owner is not negligent for dispatching a supply vessel in six to eight foot seas, seas admittedly rough but not necessarily dangerous for loading or unloading. Such activity is not at all unusual at the myriad offshore platforms in the gulf."

The fact situation in the instant case was *critically different* from the situation in the case of *Hebron v. Union*, the case in which the court held, as indicated above, that the dispatching of a supply vessel in six to eight foot seas is not necessarily dangerous. The *critical difference* is that the cargo at issue in the instant case was tubular such that it would likely roll from side to side on the pitching vessel and thereby be far more dangerous than something that was not tubular and would not constantly roll the width of the vessel. The cargo in the *Hebron* case was a prefabricated A-frame whereas the cargo in the instant case was tubular i.e., drill collars (which are heavy pipes).

The experts consulted and questioned in the instant case stated that six to eight foot seas while rough, are not too dangerous to handle non tubular goods (their state-

ments being perfectly consistent with the court's "holding" in *Hebron*), but they drew a definite distinction when the cargo was to be tubular such as drill pipe or drill collars. This distinction is precisely the reason why the undersigned in questioning the Exxon experts always was careful to use the words "tubular goods" or "drill collars" in his questions relative to whether the practice was unnecessarily dangerous! With reference being made to tubular goods or "drill collars" the Exxon personnel themselves admitted that the practice was unsafe![5]

The jury listened to the evidence. The jury caught the distinction between tubular goods and non-tubular goods.

If some expert or other "pronouncer" would have said to the jury that Exxon could not be negligent for instigating on a regular basis procedures requiring the handling of tubular goods in six to eight foot seas because it is not necessarily negligent to send prefabricated A-frames in six to eight foot seas for handling the undersigned in cross examination and in closing arguments would have made short work of such experts or "other pronouncer" as would the alert jurors in their deliberations.

In fact, *if*, as the lower court *concluded* from the A-

[5] Stevedoring operations in ports, such as the ports of New York, Philadelphia, New Orleans, etc., are always conducted in the calmest of waters. Imagine the hazards in conducting stevedoring operations on small boats in waters which cause them to roll from side to side and go up and down—particularly when the cargo is heavy and will roll.

Frame case (the *Hebron* case), it is not negligent to load tubular goods in six to eight foot seas—then Diamond M did nothing wrong (the only negligence attributable to Diamond M is its crane operator's lowering of tubular goods on the vessel in six to eight foot seas) and the trial judge should have directed a verdict in Diamond M's favor. It is only *because* tubular goods are different from other type of goods that liability was visited!

The simple fact is that seas which are too rough for a deck crew to be handling tubular goods may not necessarily be too rough for a deck crew to handle non tubular goods, such as a prefabricated A-frame which will not constantly roll from side to side. The accident at issue occurred when the tubular goods were rolling from one side of the pitching boat to the other side—back and forth. The other cargo which had been loaded onto the boat in the instant case did not cause a problem and was readily accepted by the captain—the *tubular goods* were a different story, by everybody's testimony.

The issue before the jury was simply whether Exxon's prior consistent practice of regularly sending vessels the size of the BECT I to receive *tubular goods* in six to eight foot seas constituted negligence causally related to plaintiff's injury. Both the Exxon transportation supervisor, the man who is in charge of dispatching the vessels with cargo and who makes decisions with respect to the appropriateness of the cargo and the seas and the Exxon man at the platform admitted that the sending of

vessels to receive *tubular goods* in six to eight foot seas is unsafe but that Exxon does it anyway! The jury believed, as rightly they could, and should, that the crane operator's decision to lower the tubular goods in the six to eight foot seas was related to, at least partially caused by, his prior experience on that Exxon platform. The crane operator did not lower the drill collars in a vendetta against anyone on the vessel. He simply did what he thought was expected of him.

The fact that the Exxon representative on the platform was asleep at the moment of this particular loading is a "red herring" and has absolutely nothing to do with the issue of Exxon's negligence in having on prior occasions regularly actively fostered as well as condoned the admitted unsafe practice on its platform.

The jury saw that the real issues were the plaintiff versus Exxon and the plaintiff versus Diamond M. The jury saw vis-a-vis the plaintiff and Exxon, Exxon was indeed partially at fault.

The fact which the appellate court overlooked or misapprehended in its judicial notice of fact was that a definite distinction is to be drawn between the handling of tubular goods in six to eight foot seas and the handling of non tubular goods under those same conditions.

It is respectfully submitted that it is improper for the court to have used testimony relative to what was safe

under the circumstances existent under some other case—particularly a borderline safety case—as the criteria for safety in this (or any other) case which involved differences, some subtle, some not so subtle.

The undersigned had no opportunity to cross-examine the parties in the "other case" nor any opportunity to present his own experts to contradict whatever expert, if any, that testified in the other case.

It is respectfully submitted that this court should correct the error and set out the appropriate criteria for judicial notice of facts at the appellate level.

INFLATION

The trial judge with respect to the issue of damages gave the following instruction:

> "You may also take into consideration the decreased purchasing power of the dollar, or what is commonly called inflation".

The above was the only mention made as to inflation.

The United States Court of Appeals for the Fifth Circuit in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5 Cir. 1975); cert. denied, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed 2d 58, held that it was error for the jury to have been charged that it may take inflation into account in fixing the damage award.

In *Johnson v. Penrod Drilling Co.*, the court, sitting en banc, ruled:

> "We judicially notice that inflationary conditions in this nation's economy have worsened in the interim between the November 21, 1972 panel opinion and today and we recognize that this accelerating rate of inflation increases the likelihood that inflation could become a predictable condition for the future. Nevertheless, with this added light, we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages. The worsening of inflation might as readily foretell a recession or a depression as its continuity. Strong governmental countermeasures have been proposed and their efficacy is still unknown. Then too, if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mtiigate the failure to include an inflationary surcharge in wage rate calculations. In addition to the Second and Sixth Circuit decisions cited in Judge Simpson's opinion, we note that three other circuits appear to agree with this procedure. Cunningham v. Bay Drilling Company, 421 F.2d 1398 (5th Cir. 1970) is overruled. To the intent that Canal Barge Company, Inc. v. Griffith, 480 F.2d 11 (5th Cir. 1973) announced a contrary view, that opinion cannot stand.
> (Quoted from 510 F.2d at 235, 236).

Recently the Fifth Circuit, en banc, in *Byrd v. Reederi*, 688 F2d 324, 5 Cir. 1982 and *Culver v. Slater Boat Co.*, 688 F2d 280, 5 Cir. 1982 reversed *Johnson v. Penrod*

Drilling Co., but in so doing held that certain guidelines with respect to the inflation issue must be followed.

In the instant case there was, as indicated above, merely a blanket "carte blanche" invitation and instruction, with no guidelines or restrictions, for the application of an increase to the award because of "inflation".

The United States Court of Appeals for the Third Circuit in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F2d 453 (3 Cir. 1982), cert granted 82-131, 51 LW 3253 not only held that inflation should be taken into account, it also specifically approved the "total offset" method of calculating the future effect of inflation. The court held:

> "We therefore hold that the district court did not err in computing damages for the loss of future earnings, because it is not necessary to go through the process of discounting lump sum awards to theoretical present value; the discount factor is presumed equal to and offset by the impact of inflation on the future economic value of the award."

This court has granted certiorari in the *Pfeifer* case under docket number 82-131.

The Fifth Circuit in *Culver v. Slater Boat Co.* specifically rejected the "total offset" method. Thus, even the circuits which approve the giving of an "inflation charge" are in conflict.

It is respectfully submitted that certiorari be granted in the instant case so that the propriety of the "carte blanche charge" given in the instant case can be briefed and considered.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

PHILIP E. HENDERSON
Attorney for Petitioner

CERTIFICATE

I HEREBY CERTIFY, that a copy of the foregoing pleading has been served upon counsel for all parties by placing same in the United States mail, postage prepaid and properly addressed.

HOUMA, LOUISIANA this _____ day of January, 1983.

PHILIP E. HENDERSON

APPENDIX "A"

David R. TARLTON, Plaintiff-Appellant,

v.

EXXON, Defendant and Third-Party Plaintiff-Appellee,

DIAMOND M DRILLING, Defendant and Third-Party Plaintiff-Appellant-Appellee,

v.

GOLDEN MEADOWS ENTERPRISES, INC., and Eserman Offshore Services, Third-Party Defendants-Appellants,

v.

COASTAL BOAT OPERATORS, Third-Party Defendants-Appellees.

No. 80-3478.

United States Court of Appeals, Fifth Circuit.

Sept. 27, 1982.

Captain of vessel used to service offshore platforms sued platform owner and drilling operator to recover for injuries sustained while attempting to secure drill collars which a crane operator for drilling contractor had placed on board the vessel. Third-party claims were filed. The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., granted platform owner's motion

for judgment n.o.v. and ordered new trial conditioned of remittitur, and appeal was taken. The Court of Appeals, Politz, Circuit Judge, held that: (1) evidence established that cause of accident was decision by crane operator to "sneak" the drill collars on board the vessel; (2) although platform owner's motion extended time for filing notice of appeal it did not extend time for the court to sua sponte order a new trial; and (3) injuries did not arise out of "operations of the vessel" within meaning of indemnity agreement.

Affirmed in part, vacated in part and reversed in part.

1. Federal Civil Procedure 2608

A mere scintilla of evidence is not sufficient to sustain a jury determination and thereby avoid judgment n.o.v.

2. Federal Civil Procedure 2609

In evaluating a motion for judgment notwithstanding the verdict, the district court must review the evidence in the light most favorable to the verdict.

3. Principal and Agent 3(2)

A principal cannot be held answerable for failure to supervise an independent contractor.

4. Seamen 29(1)

An offshore platform owner is not negligent for dispatching a supply vessel in six to eight-foot seas, seas admittedly rough but not necessarily dangerous for loading or unloading.

5. Seamen 29(5.14)

Evidence in service boat captain's action to recover for injuries sustained while securing drill collars which had been loaded by independent contractor's crane operator for a return trip to shore established that cause of accident was not action of offshore platform owner's representative in condoning loading of vessels in six to eight-foot seas in the Gulf of Mexico but the decision by the crane operator to "sneak" the collars on board the vessel, in that captain had agreed to transport empty food box, a few passengers and "some other small things" to shore.

6. Jury 31(7½)

Granting of a new civil trial, to be avoided only be acceptance of remittitur, did not violate Seventh Amendment. U.S.C.A. Const. Amend. 7.

7. Federal Civil Procedure 2366

Time limit for filing a new trial motion is mandatory and jurisdictional and cannot be extended by the trial

court. Fed. Rules Civ. Proc. Rule 59(b), 28 U.S.C.A.

8. Federal Civil Procedure 2366

A party may not belatedly join another litigant's new trial motion and thereby circumvent the jurisdictional limits for filing a new trial motion. Fed. Rules Civ. Proc. Rule 59(b), 28 U.S.C.A.

9. Federal Civil Procedure 2364

Expansion of trial court's power to order a new trial for reasons not raised by the movant does not operate to extend the period in which the court can grant a new trial on its own initiative. Fed. Rules Civ. Proc. Rule 59(d), 28 U.S.C.A.

10. Federal Civil Procedure 2364

Absent timely motion for a new trial or an order by the trial judge within ten days of entry of judgment, the trial court was without jurisdiction to sua sponte order a new trial. Fed. Rules Civ. Proc. Rule 59(d), 28 U.S.C.A.

11. Federal Civil Procedure 2364

Word "judgment" in rule authorizing a trial court to sua sponte grant a new trial not later than ten days after entry of judgment does mean "final judgment" or "appealable judgment" and, hence, fact that motion for judg-

ment n.o.v., new trial or remittitur extended time for filing notice of appeal did not mean that it likewise extended the time for sua sponte order of new trial. Fed. Rules Civ. Proc. Rule 59(d), 28 U.S.C.A.

12. Federal Civil Procedure 2364

Rule authorizing trial court to sua sponte order a new trial not later than ten days after entry of judgment is designed to empower the trial judge to correct an injustice occasioned, primarily, by a jury verdict. Fed. Rules Civ. Proc. Rule 59(d), 28 U.S.C.A.

13. Indemnity 8(4)

Where at time of injury captain of vessel used to service offshore platforms was attempting to secure tubular drilling collars that had been loaded onto the vessel surreptitiously and negligently by an independent contractor which conducted drilling operations the accident did not arise either from the "operation of the vessel" within meaning of charter agreement and was not encompassed by indemnity clause of service agreement for vessel operation, which clause applied to omissions while performing or attempting to perform the services contemplated.

See publication Words and Phrases for other judicial constructions and definitions.

14. Damages 212

In action by captain of offshore platform service vessel to recover for injuries sustained in attempting to secure drill collars it was not error to charge that present rate of inflation could be considered in assessing damages award.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ and RANDALL, Circuit Judges*.

POLITZ, Circuit Judge:

David tarlton was injured while serving as the captain of the M/V BECT I, a vessel owned by Eserman Offshore Services, chartered to Exxon and operated by Golden Meaddows Enterprises, Inc. The BECT I was used to service offshore platforms. On the day of Tarlton's accident, it delivered food supplies to an Exxon platform, on which Diamond M Drilling Company conducted drilling operations.

After the food box was off-loaded, a Diamond M employee asked Tarlton to transport the empty food box, a few passengers, and "some other small things" to shore.

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* Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, was a member of the panel which heard oral argument. Because of his death, this case is being decided by a quorum, 28 U.S.C. § 46(d).

Tarlton agreed. At the time, seas were running six to eight feet. Notwithstanding the substantial seas, the platform crane operator, an employee of Diamond M, loaded tubular drill collars onto the deck of the BECT I. Tarlton was not aware the "small things" were drill collars until after they were placed aboard. It was imperative that the drill collars, which were rolling about the deck, be secured. While attempting to do so, Tarlton was injured. During this unfortunate scenario, late in the evening, Exxon's platform representative was not on the platform deck; he was asleep.

Tarlton initially filed a seaman's complaint against Diamond M and Exxon, later amending to add Eserman, Golden Meadows and Coastal Boat Operators (the company which brokered the BECT I to Exxon) as additional defendants. Tarlton also alleged the unseaworthiness of the BECT I and sought maintenance and cure in his claim.

Eserman and Golden Meadows cross-claimed against Exxon and Diamond M for reimbursement of sums paid Tarlton for maintenance and cure, sums in fact paid by American Home Assurance Company. Exxon cross-claimed against Golden Meadows, Coastal, and Eserman for indemnification and attorney's fees pursuant to contracts extant between them. Coastal cross-claimed against Golden Meadows and Eserman for attorney's fees and costs. As the parties went to trial, Exxon and Diamond M agreed that Exxon would indemnify Diamond M if "a final judgment, after completion of all post-trial motions, appeals, etc. is entered, finding that the plaintiff's alleged

injuries were proximately caused by the joint negligence of Diamond and Exxon."[1]

The case was tried to a jury, which returned a special verdict finding Diamond M and Exxon liable to Tarlton, with fault percentages of 95% and 5%, respectively. Coastal, Eserman, and Golden Meadows were found free of fault and the BECT I was found seaworthy. The jury awarded Tarlton $450,000 in damages and fixed "10-11-79" as the date when maximum cure was reached, thus setting the basis for the maintenance and cure award.

Ruling on the various cross-claims, the district court rejected Eserman's and Golden Meadows' demand for reimbursement of maintenance and cure payments from Exxon and Diamond M, finding that American Home Assurance Company had paid these sums and had specifically waived its subrogation rights.[2] The court granted Exxon's claim against Golden Meadows and Eserman for attorneys' fees and costs and granted Coastal's claim against Golden Meadows and Eserman for attorneys' fees and costs.

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[1] When Tarlton sued Diamond M, it brought a cross-claim against Exxon, calling for Exxon to defend, indemnify, and hold it harmless pursuant to their contract. Initially, Exxon accepted the demand and assumed Diamond M's defense. Subsequently, Exxon informed Diamond M that it would no longer defend it. Thereafter, the quoted stipulation was agreed to.

[2] By an order ddated May 14, 1980, the district court amended its earlier ruling and awarded Golden Meadows $500.00 on its cross-claim against Diamond M for reimbursement of maintenance and cure.

Exxon moved for judgment notwithstanding the verdict and sought a remittitur. The trial judge granted Exxon's motion for judgment n.o.v. Additionally, on its own motion, the trial judge modified the judgment against Diamond M by ordering "that a new trial on the issue of damages be held unless plaintiff remits $75,000.00 of the jury award."

Four issues are posited for appellate review: (1) whether the trial court erred in granting Exxon's motion for judgment n.o.v.; (2) whether the trial court erred in granting a motion for a new trial on the amount of damages conditional on the plaintiff's acceptance of a $75,000 remittitur in light of Rule 59(d) of the Federal Rules of Civil Procedure; (3) whether error was committed in awarding Exxon and Coastal costs and attorneys' fees against Golden Meadows and Eserman; and (4) whether the trial judge erred in instructing the jury to consider inflation as a factor in assessing Tarlton's award. Our review of the record compels the conclusion that the district court erred in entering the remittitur order and in granting Exxon's and Coastal's claims for costs and attorneys' fees against Golden Meadows and Eserman. Accordingly, we affirm in part, vacate in part, and reverse in part.

Judgment Notwithstanding the Verdict

[1,2] The oft-cited decision in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) articulates the rubric in this circuit for the grant or denial of a judgment n.o.v. In

essence, a mere scintilla of evidence is not sufficient to sustain a jury determination; "[t]here must be a conflict in substantial evidence to create a jury question." *Id.* at 375. *See, e.g., Hagans v. Oliver Machinery Co.*, 576 F.2d 97 (5th Cir. 1978). In the process of evaluating the motion, the district court is obliged to review the evidence in the light most favorable to the jury's verdict. This was done in the case at bar. Having walked the same path as the trial judge, we reach the same conclusion.

The record reflects that while the Exxon representative was on the platform at the time of the accident he was asleep. He was not aware of the unloading of the grocery box, that Tarlton had been requested to return with the emptied box, or that Tarlton had been asked to transport passengers and other small items. Nor was he alerted to the fact that the Diamond M crane operator might surreptitiously place the drill collars on the deck of the vessel without first consulting Captain Tarlton. The Exxon representative did not order the loading of the drill collars; he did not authorize the loading; and he was in no way forewarned. The only basis suggested for saddling Exxon with negligence is that it sanctioned the type of conduct that occurred the night of the accident, *i.e.*, loading in rough seas.

[3-5] Diamond M maintains that Exxon representatives previously had condoned loading vessels in six to eight foot seas, a practice cited as negligent.[3] Although

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[3] Diamond M would visit negligence upon Exxon for not prevent-

this proposition bears some surface appeal, it fades upon closer examination. As we held in *Hebron v. Union Oil Co. of Calif.*, 634 F.2d 245 (5th Cir. 1981), a platform owner is not negligent for dispatching a supply vessel in six to eight foot seas, seas admittedly rough but not necessarily dangerous for loading or unloading. Such activity is not at all unusual at the myriad offshore platforms in the gulf.

Our review of the testimony convinces us beyond peradventure that the cause of the accident was the decision by the Diamond M crane operator to "sneak" the drill collars on board the BECT I. The crane operator admitted he had to act stealthily because he believed Captain Tarlton would not have allowed him to load the tubular drill collars on the vessel. In view of this testimony and the other evidence, we are in total agreement with the district judge that "[i]t was the decision to load the drill collars onto plaintiff's vessel which was the negligence which caused plaintiff's injury." The judgment n.o.v. was properly granted.

Remittitur

[6] Tarlton challenges the remittitur on two grounds.

(Footnote 3 continued)

ing the loading. But it must be remembered that Diamond M was an independent contractor on Exxon's platform. The crane, the drill collars, and the employees involved in the accident were under Diamond M's control. Consequently, aside from the fact that the Exxon representative did not order or authorize the loading of the tubular drill collars in seas running six to eight feet, Diamond M must cross the legal hurdle that a principal cannot be held answerable for failing to supervise an independent contractor. *See McCormick v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979). This has not been done.

We discern no merit in the first contention that the granting of a new trial, to be avoided only by acceptance of the remittitur, was an unconstitutional act, violative of the seventh amendment. To the contrary, it is now firmly established that the remittitur practice is not in conflict with the seventh amendment. *See, e.g., Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980); *Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815 (2d Cir. 1977), *aff'd*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665 (5th Cir. 1974); *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033 (5th Cir. 1970). *See also Dimick v. Scheidt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

Tarlton's second attack on the remittitur presents a serious issue, having at its core the question of the proper application of Rule 59(d) of the Federal Rules of Civil Procedure which prescribes:

> Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

On March 21, 1980, the jury returned a verdict in favor of Tarlton against Diamond M and Exxon in the amount of $450,000. The jury found Diamond M 95% at

fault and Exxon 5% at fault. Demands against all other defendants were rejected.

Based on this verdict, the district judge entered judgment on the main demand on March 27, 1980, casting Diamond M for $427,500 and Exxon for $22,500. Within 10 days, on April 7, 1980, Exxon moved for a judgment n.o.v., a new trial, or in the alternative, a remittitur. A hearing on Exxon's motions was held on May 14, 1980, and the motions were taken under advisement. Although initially opposed, Diamond M sought at this hearing to orally join in Exxon's motions. On June 3, 1980, the trial court granted Exxon's request for judgment *non obstate veredicto* and dismissed Tarlton's claim against it. Acting *sua sponte,* the court simultaneously ordered a new trial on the issue of damages "unless plaintiff remits $75,000.00 of the jury award.

We must determine whether this order was timely. Concluding that it was not, we vacate the order for a new trial on the issue of damages and reinstate the judgment based on the jury verdict, modified to delete the adjustment attributable to the jury's finding of Exxon's 5% negligence, thus casting Diamond M for the full amount of damages awarded by the jury.

[7,8] The time limit for filing a new trial motion imposed in Rule 59(b) is mandatory and jurisdictional; it cannot be extended by the trial court. *Gribble v. Harris,* 625 F.2d 1173 (5th Cir. 1980); *Albers v. Gant,* 435 F.2d 146 (5th

Cir. 1970). Diamond M's oral motion on May 14, 1980 was not timely and is, accordingly, without effect.[4] The trial court's grant of a new trial can thus be upheld only if it satisfies the provision of Rule 59(d) for *sua sponte* judicial action within 10 days of the entry of judgment.

[9] Prior to its 1966 amendment, Rule 59(d) was interpreted to preclude a trial court from granting a new trial on a ground not stated in a motion filed seasonably, *i.e.*, within 10 days of the entry of judgment. *See, e.g., Russell v. Monongahela R.R. Co.*, 262 F.2d 349 (2d Cir. 1958); *Freid v. McGrath*, 76 U.S.App.D.C. 388, 133 F.2d 350 (1942); *Marshall's U.S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140 (10th Cir.), *cert. denied*, 311 U.S. 667, 61 S.Ct. 26, 85 L.Ed. 428 (1940). According to the Notes of the Advisory Committee on Rules, this situation was "undesirable." The Committee noted that "[j]ust as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have the power, when an effective new trial motion has been made and pending, to decide it on the grounds thought meritorious by the court although not advanced in the motion." The second sentence of Rule 59(d) was added in 1966 to afford the trial court this authority. But the expansion of the trial court's power to

[4] In addition to citing rule 59(d), although recognizing that Diamond M did not join Exxon's motion—indeed, initially opposed it—the trial judge stated that "at oral argument, Diamond M joined in the motion for remittitur." Accordingly, the trial court considered "the motion for new trial or, alternatively, remittitur as having been filed on behalf of Diamond M as well as Exxon." We cannot accept this reasoning. Diamond M's attempt to join Exxon's motion came after the 10 days allowed by Rule 59(b). A party may not belatedly join another litigant's motion and thereby circumvent the jurisdictional requirements of the rule.

order a new trial for reasons not raised by the mover does not operate to extend the period in which the court can grant a new trial on its own initiative.

[10] The language of rule 59(d) is explicit: the trial court may order a new trial for any reason it might have found sufficient on motion of a party, "not later than 10 days after entry of judgment." In the case at bar, the district court's order of June 3 was obviously filed more than 10 days after the March 27 judgment. And it granted relief to Diamond M on the basis of a reason urged by Exxon in its timely filed motion, originally opposed by Diamond M. We conclude that absent a timely motion by Diamond M for a new trial, or an order by the trial judge within the 10 days permitted by the rule, the trial court was without jurisdiction to enter a *sua sponte* order for a new trial.[5]

[11] Apparently in recognition of this jurisdictional limit, Diamond M contends that "judgment" as used in Rule 59(d) should be read "final judgment" or "appealable judgment." Diamond M suggests that because the Exxon motion extended the time for the filing of a notice of ap-

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[5] This view is shared by our colleagues in other circuits. *See peterman v. Chicago, Rock Island & Pacific R.R. Co.*, 493 F.2d 88 (8th Cir. 1974), *cert. denied*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975); *Tsai v. Rosenthal*, 297 F.2d 614, 617 (8th Cir. 1961) ("Rule 59(d) has been interpreted by the courts as conferring jurisdiction upon the trial court to act upon its own initiative only during the ten days immediately following the entry of the judgment."); *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957); *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953). A leading commentator shares the same view. C. Wright, *Law of Federal Courts* § 95 at 469 (1976).

peal, Fed. R. App. P. 4(a)(4), it should likewise extend the time for entry of a *sua sponte* order of new trial under Rule 59(d). We disagree. The purpose served by the two rules differ.

Appellate Rule 4(a)(4) looks to the next level of court and is designed in part to keep the trial court action intact, in one appealable unit, until the entire litigation is completed in the trial court by disposition of all post-trial motions. At that point, all parties have the same time in which to notice an appeal.

[12] Rule 59(d) is designed to empower the trial judge to correct an injustice occasioned, primarily, by a jury verdict. The error in the verdict should be, except in the rarest of cases, apparent immediately upon return of the verdict. In those instances, the court may act, but it must exercise its authority with dispatch, within the limited period established by the rule. Just as the court may not extend the period for a party to file a motion for a new trial, it may not extend the period for a court-initiated action.

To accept Diamond M's argument and extend the time for the trial court to act under 59(d) until the judgment becomes appealable would require a rewriting of the rule. This we decline to do. Nothing in the language or history of Rule 59(d) suggests that the 10-day period is intended to signify anything other than 10 days from entry of judgment. There is no suggestion that the period may be extended, directly or indirectly. No parallel may be drawn

to Fed. R. App. P. 4 which expressly provides that the time for appeal is suspended by the filing of a timely post-trial motion, running only after the court's ruling thereon. Acceptance of Diamond M's argument would allow the time prescribed by Rule 59(d) to be extended indefinitely for all defendants simply because one defendant timely sought post-trial relief. That could result in the anomolous situation of the court, months after the verdict, denying a timely filed motion of one defendant, and *sua sponte*, granting relief to a defendant who sought no relief.

We conclude that the trial court was without jurisdiction to grant Diamond M a new trial, a conclusion which requires that we vacate the new trial ordered on the issue of damages.

Costs and Attorneys' Fees

Eserman and Golden Meadows contend that the trial court erred in imposing upon them Exxon's and Coastal's costs of defense and attorneys' fees. Resolution of this issue turns upon interpretation of contractual indemnity agreements between these parties. Our reading of the contractual language in light of *LaNasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971), convinces us that the district court's award of costs and attorneys' fees was improper.

Eserman's bareboat charter agreement with Candies Offshore Transportation Corp., for the service of the BECT I, contemplated Candies brokering the vessel to Exxon.

Infusing the names of the parties into the text of the contract, paragraph X of the charter agreement reads:

> [Eserman] agrees to indemnify and hold [Coastal] and [Exxon] harmless...from any claims or suits resulting from injury or damage to...third persons...*arising out of the operation of the vessel* under this charter, unless caused by the sole negligence of [Candies]....

(Emphasis added.) And restructuring paragraph XIV of the service agreement for operation of the vessel, between Coastal and Golden Meadows, results in the following:

> [Golden Meadows] binds and obligates itself to indemnify and save [Exxon], [Coastal] and [Candies] harmless from and against any and all claim or claims or causes of action asserted by employees of [Golden Meadows]...resulting from the operation of [the BECT I] and/or the *acts or omissions of the captain or crew of [the BECT I] while performing or attempting to perform the services herein contemplated* and whether or not arising out of the joint and concurrent acts or omissions of [Exxon], Coastal ... and Candies....

(Emphasis added)

As we have underscored, the operative language in both agreements focuses upon services or operations of the vessel. In *LaNasse* we considered the effect of a similar provision, which stated:

> Owner [Cheramie BoTruc No. 5] hereby agrees to

> indemnify and hold harmless The California Company against all claims***as well as against any and all claims for damages, whether to person or property, and however arising in any way *directly or indirectly connected with the possession, navigation, management, and operation of the vessel.*

450 F.2d at 582 n. 4 (emphasis in original). Porphire LaNasse had been injured in the course of his duties as a crew member aboard the utility tender BO-TRUC NO. 5, while assisting in the transfer of a welding unit from a vessel to a platform. The crane operator, employed by Chevron Oil Company, caused the load to swing against the tender's railing and into LaNasse. Accepting the district court's conclusion that the proximate cause of LaNasse's injury was the negligence of Chevron's crane operator, we proceeded to declare the indemnity agreement inapplicable:

> The indemnity provision in the time charter insulated Chevron only against liability for claims "directly or indirectly connected with the possession, management, navigation, and operation" of the vessel. Cheramie does not have a legal responsibility for the consequences of the negligent operation of the crane—the proximate cause of the injury—because, on the facts found, the operation of the crane was not even remotely related to the operation, navigation or management of the vessel. As broad as those terms are to comprehend injuries caused by the operation of the vessel in a practical sense, they do not comprehend an occurrence in which the vessel's sole contribution is to be there as the carrier from which the cargo is being removed.

Id. at 583.

[13] The circumstances involved in the instant case are similar to the situation addressed in *LaNasse*. At the time of Tarlton's injury, he was attempting to secure tubular drill collars that had been loaded onto the BECT I surreptitiously and negligently. It was the negligence of Diamond M's crane operator that caused Tarlton's injury. The accident simply was not caused by the operation of the vessel; nor did it arise from the expected performance of its services.[6] Although the indemnification agreements in dispute in this case are not identical to the contractual provision construed in *LaNasse*, we are not persuaded that the variances aree significant enough to command a different result. We conclude that the *LaNasse* rationale applies. Since the cause of Tarlton's injury did not arise from the operation of the vessel, the district court should not have awarded Exxon and Coastal costs and attorneys' fees against Eserman and Golden Meadows. That portion of the trial court's judgment is reversed.

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[6] In addition, with regard to the service agreement struck by Coastal and Golden Meadows, we note that paragraph VII states:

> Notwithstanding anything to the contrary herein, it is understood that the duties of the crew of the vessel will be limited to navigation, maintenance and the loading and discharge, or board of liquid cargoes. *The crew shall not be required, under any circumstances, to load or unload supplies or cargo other than aforesaid.*

(Emphasis added.) Given our construction of the indemnity contracts according to *LaNasse*, however, we do not decide the issue on the basis of this clause.

The Inflation Factor

[14] A final issue raised for our consideration is whether the trial court erred by instructing the jury that the present rate of inflation may be considered in assessing the plaintiff's award. For the reasons extensively set forth in our recent *en banc* decisions in *Byrd v. Reederei*, __ F.2d __, slip op. __ (5th Cir. 1982), and *Culver v. Slater Boat Co.*, __ F.2d __, slip op. __ (5th Cir. 1982), this portion of the court's charge was not erroneously given. Accordingly, there is no validity in this allegation of error.

For the reasons assigned, the judgments of the district court are AFFIRMED in part, VACATED in part, and REVERSED in part.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-3478

DAVID R. TARLTON,
Plaintiff-Appellant,

versus

EXXON,
Defendant and Third Party Plaintiff-Appellee,

DIAMOND M DRILLING,
Defendant and Third Party Plair.tiff-Appellant-Appellee,

versus

GOLDEN MEADOWS ENTERPRISES, INC. and ESERMAN OFFSHORE SERVICES
Third-Party-Defendants-Appellants,

versus

COASTAL BOAT OPERATORS,
Third-Party-Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING (NOVEMBER 12, 1982)

Before POLITZ and RANDALL, Circuit Judges*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

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United States Circuit Judge

* Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, was a member of the panel which heard oral argument. Because of his death, this case is being decided by a quorum, 28 U.S.C. § 46(d).